IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

THURSDAY, THE 15TH FEBRUARY 2007 / 26TH MAGHA 1928

OP.No. 3365 of 2003(A)

PETITIONER:

VALSAMMA JOSEPH, S/O. JOSEPH,
AGED 50 YEARS, HIGH SCHOOL ASSISTANT
GOVERNMENT MODEL HIGH SCHOOL FOR GIRLS
ALAPPUZHA.

BY ADV. SRI.V.A.MUHAMMED
SRI.K.E.HAMZA

RESPONDENTS:
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1. **THE STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT GENERAL EDUCATION DEPARTMENT, SECRETARIAT, TRIVANDRUM.**

2. **THE ACCOUNTANT GENERAL (A & E) KERALA, TRIVANDRUM.**

3. **THE DISTRICT EDUCATIONAL OFFICER, ALAPPUZHA.**

4. **THE HEADMISTRESS, GOVERNMENT MODEL HIGH SCHOOL FOR GIRLS, ALAPPUZHA.**

BY SPL. GOVERNMENT PLEADER SRI.PRAKASH

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 15/02/2007, ALONG WITH W.P.(C) 10555/2004 AND CONNECTED CASES THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP. NO.5965/2003 IN OP. 3365/2003

DISMISSED

15.02.2007 **SD/- K.A.ABDUL GAFOOR, JUDGE**

SD/- ANTONY DOMINIC, JUDGE

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE STATEMENT OF FIXATION OF THE PETITIONER.

EXT.P2:- COPY OF THE EXTRACT OF THE OBJECTION OF THE PETITIONER.

EXT.P3:- COPY OF THE EXTRACT OF ANNEXURE III OF G.O.(P) NO.3000/98/FIN. OF THE GOVERNMENT.

EXT.P4:- COPY OF THE EXTRACT OF APPENDIX III OF GO(P) NO.480/89/FIN. OF GOVT.

EXT.P5:- COPY OF THE JUDGMENT IN OP. NO.23261/98

EXT.P6:- COPY OF THE LETTER OF THE2ND RESPONDENT.

EXT.P7:- COPY OF THE LETTER OF THE GOVERNMENT.

EXT.P8:- COPY OF THE INTERIM ORDER IN CMP. NO.41833/02 IN OP. NO.24702/02.

EXT.P9:- COPY OF THE JUDGMENT IN OP. NO.24702/02.

EXT.P10:- COPY OF THE JUDGMENT IN WP(C) NO.1645/04.

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K.A.ABDUL GAFOOR &
ANTONY DOMINIC , JJ .

O.P.NO.3365/03, W.P.(C)Nos.40319/03, 8912, 10366, 10555, 15615, 17336, 21075, 26885, 28056, 28074, 29930, 36011, 36225, 36833 of 2004, 1694/05 & W.A.No.288/05

Dated this the 15th day of February, 2007.

JUDGMENT

Abdul Gafoor, J.

These appeals are by the State of Kerala. The State of Kerala is aggrieved by the impugned judgment, wherein a learned single Judge quashed the re-fixation and recovery ordered by the Government consequent on rectification of an allegedly wrong pay fixation in the revised scales. The point arising in these cases is whether the aided school service that the Government School Teachers have, prior to their commencement of Government service, can be tagged on to the Government Service for computing weightage as per the pay revision order. The pay

revision order, G.O.(P)No.3000/98/Fin dated 25.11.1998 effected revision of scales of pay with effect from 1.3.1997. This covers school teachers as well. It provided for giving weightage for the service rendered by the employees including teachers. One per cent of the basic pay was allowed for every completed year. All the writ petitioners are Government School Teachers. Before commencement of Government Service, they had been working as aided school teachers. Thus, they had both aided school service as well as Government school service. Whether the aided school service can be tagged on to the Government School Service for the purpose of the said weightage is the point involved, as already mentioned above.

2. The learned single Judge, in the impugned judgment noticed that:

> ***"In the 1997 pay revision order, it is not stated that aided school service shall not be reckoned for weightage."***

and therefore, held that the objection raised by the Accountant General was not justifiable.

3. The pay revision order is in respect of the pay scales of Government employees including teachers. Necessarily, the weightage shall be on the basis of the order whereby pay revision is effected. It is agreed before me by either side that pay revision orders issued upto and including 1992 pay revisions contained a provision to the effect that:

> ***"In the case of School Teachers (both aided and Government) the entire teaching service in Government and Private Schools, in full-time appointments under certain categories will be reckoned for weightage."***

4. It was based on these orders weightage had been reckoned during the pay revisions effected upto and including 1992. Thus, there were categoric

orders to count aided school service as well for the purpose of weightage.

5. It is also agreed that G.O.(P) No.3000/98/Fin. dated 25.11.1998 did not contain such a provision. But it provided that the service that can be counted for the purpose of weightage is the service which qualifies for normal increments alone. It is the further admitted position by both sides that aided school service will not be counted for granting increments in the pay of a Government School Teacher, on appointment in Government Service. Thus, the effect of G.O.(P)No.3000/98/Fin is that the service which can be counted for increment alone will be counted for the purpose of weightage. In other words, the service which does not qualify for increment will not be taken for the grant of weightage. Consequently, aided school

service cannot be tagged on to Government School Service for the purpose of weightage.

6. When the pay revision order does not specifically include a particular service for the purpose of weightage, it cannot be counted for granting the said benefits. If it is not stated that the aided school service shall be reckoned for weightage, it cannot be counted. One can draw a benefit only when there is permission in the order. Therefore, the view of the learned single Judge, that objection raised by the Accountant General is not justified, cannot be supported.

7. The next point is whether the recovery consequent on such refixation rectifying the error is justified. Decisions were cited from either side justifying their respective stand. But, we need not be detained in this regard because of the unequivocal

undertaking admittedly made by all the writ petitioners to the effect that they will refund the extra benefits, if any irregularity is found later. Such a clause is included in the pay revision order as well. When there is unequivocal undertaking that benefit arising out of any irregular pay fixation shall be refunded, any precedent will not be of any help to resist the recovery. A Division Bench of this court in W.A.No.1510/06 consisting of one among us (Abdul Gafoor, J.), after considering the various decisions, held as follows:

> **"Anyhow, there is factual difference in this case, as is contained in the counter affidavit filed by the Government. There, it has been averred, in paragraph 4, as follows:**
>
> > ***"While applying for the higher grade, the petitioner had already declared that he shall refund the extra benefit of the***

> ***Higher Grade, if any, irregularity is found later."***
>
> **Thus, even at the time of grant of higher grade, the Department had felt some doubt. That was why such a declaration had been obtained. Having given the declaration to refund the benefit obtained if any irregularity is noticed later, necessarily, the appellants cannot now turn round and contend that what had been wrongly paid cannot be recovered, if irregularity is found later. Therefore, by reason of the declaration made by the appellants themselves, they are liable to refund the amount as and when irregularity is noticed later. Therefore, the decisions relied on have no application here."**

8. In the matter of rectification of pay fixation and consequential recovery, necessarily, the said dictum applies, in the light of the unequivocal undertaking and declaration made by the writ petitioners.

Consequently, the impugned judgment has to be set aside allowing these appeals and holding that re-fixation and consequent recovery are

justified. We do so. The writ petitions will consequently stand dismissed.

Sd/-
(K.A.ABDUL GAFOOR)
JUDGE

Sd/-
(ANTONY DOMINIC)
JUDGE

sk/

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K.A.ABDUL GAFOOR &
ANTONY DOMINIC, JJ.

O.P.NO.3365/03, W.P.(C)Nos.40319/03, 8912, 10366, 10555, 15615, 17336, 21075, 26885, 28056, 28074, 29930, 36011, 36225, 36833 of 2004, 1694/05 & W.A.No.288/05

JUDGMENT

15th February, 2007.